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SUPREME COURT U.S.
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No. 06-479

In the Supreme Court of the United States

CENTER FOR BIO-ETHICAL REFORM, INC., et al.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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STATEMENT IN REPLY

Respondents make the entirely irrelevant claim that "the decision below presents no circuit conflict," arguing that "Petitioners make no contention that the ruling of the Ninth Circuit in this case is inconsistent with the rulings of any other circuit." Opp. Br. at 14. This pointless assertion ignores the relevant conflict that does exist: the Ninth Circuit's decision holding that federal law does not preempt local ordinances prohibiting tow-banner aircraft operations approved by the Federal Aviation Administration ("FAA") is in direct conflict with the Colorado Supreme Court's decision in *Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077 (Colo. 1994), which held that such local ordinances are preempted. This Court should grant review of this case and resolve this important conflict.

Additionally, Respondents can cite to no decision from this Court holding that the navigable airspace is not a federally designated public forum for use by certain speakers for aerial political speech such that a total ban on this form of expression violates the First Amendment. And the reason is simple: this is a question of first impression for this Court.

ARGUMENT IN REPLY

I. The Ninth Circuit Decision Directly Conflicts with a Decision from the Colorado Supreme Court on an Issue of National Importance Requiring Resolution by this Court.

The Ninth Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Respondents erroneously seek to distinguish the decision below from the Colorado Supreme Court's decision in *Banner Advertising*, which held that a city ordinance

prohibiting commercial signs towed by aircraft was preempted by federal law and therefore unenforceable. *Banner Adver., Inc.*, 868 P.2d at 1078-79. Respondents cannot escape the fact that the issue decided by the Colorado Supreme Court is exactly the same issue decided by the Ninth Circuit, but with a different result, thereby creating a conflict on an important federal issue that this Court should resolve. *See* Sup. Ct. R. 10. Indeed, allowing the Ninth Circuit decision to stand threatens to cause a patchwork of regulations that would force aircraft pilots to change altitude and direction every time they cross city, county, or state borders, creating unacceptable safety risks and placing an undue burden on travel and commerce.

In their opposition, Respondents engage in a sleight of hand by claiming that "[t]he Ninth Circuit explained in its *Skysign* opinion that the *Banner Advertising* facts were distinguishable from the facts relevant to Honolulu's aerial advertising ordinance. . . ."[1] Opp. Br. at 5. But this is beside the point. The facts raised by this case are identical to those found in *Banner Advertising*, thereby creating a direct conflict.

The facts that the Ninth Circuit found distinguishable in *Skysign* had to do with the language contained in the FAA Certificate of Authorization issued to Skysign. This language differed considerably with the language in the Certificate of Authorization issued to Banner. In *Skysign*, the certificate "contained a provision explicitly noting that '[t]he aircraft operator, by exercising the privilege of this waiver, understands all local laws and ordinances relating to aerial signs, and accepts responsibility for all actions and consequences

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[1] In *Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002), the Ninth Circuit upheld the Honolulu Ordinance against a prior federal preemption challenge.

associated with such operations.'" *Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109, 1117-18 (9th Cir. 2002). The Ninth Circuit further noted that "the FAA suggests that Certificates of Waiver issued to pilots towing banners include an explicit statement that the certificate and its special provisions 'do not supersede any local, state, or city ordinance(s) prohibiting aerial advertising.'" *Id.* at 1118 (emphasis added). The Ninth Circuit concluded, "Based on these provisions, we conclude that the application of Honolulu's ordinances does not impede the federal policy or purpose in issuing Skysign's Certificates of Waiver." *Id.*

Contrary to Respondents' assertions, these provisions—which were central to the Ninth Circuit's holding in *Skysign*—are not found in Petitioners' Certificate of Authorization. App. 59a-64a (Certificate of Authorization). In fact, the inclusion of such provisions would violate FAA policy as reflected in the FAA Notice issued in October 2002. *See* App. 65a-67a (FAA Notice) (directing FAA officials to remove from certificates of authorization any language indicating that "[t]his certificate and these special provisions do not supersede any local, State or city ordinance(s) prohibiting aerial advertising"). Moreover, the revised FAA Handbook regulating such procedures expressly prohibits including such language. *See* App. 74a (FAA Handbook) (stating that FAA officials "must *not* insert into the 'Special Provisions' section of [the Certificate of Authorization] any language relating to the application of State or local law (including regulations, ordinances, etc.) to banner tow operations authorized by the certificate, including the legal responsibilities of banner tow operators to comply with State or local regulations prohibiting or restricting banner tow operations.").

Respondents' reliance on the general "Note" provision found on all FAA Certificates of Authorization is similarly

misleading and misplaced. Opp. Br. at 3, 7-8. Respondents inaccurately claim that this "Note" provision, which concerns the waiver of State law or local regulations, is an acknowledgment by the FAA that it is subjecting its authority to regulate tow-banner operations to the authority of local governments. Opp. Br. at 7-8. In actuality, the FAA considers this "Note" provision to be mere "boilerplate" that "has no legal effect and should be disregarded by inspectors. This is a disclaimer of responsibility by the FAA for the enforcement of State or local ordinances." App. 74a (FAA Handbook).

Moreover, in *Banner Advertising* both the FAA and the Colorado Supreme Court rejected the misinterpretation of FAA policy that Respondents offer here. The FAA certificate at issue in *Banner Advertising* contained the very same "NOTE" provision identified by Respondents. *See Banner Adver.*, 868 P.2d at 1079 (noting that the FAA Certificate contained a provision stating that the waiver "does not constitute a waiver of any state law or local ordinance"). The Colorado Supreme Court addressed this provision, stating, "[T]he federal government in this situation has no power to exempt an individual from a proper state or local law. By restricting its direct effect to federal laws, the certificate only states a fundamental principle of the doctrine of federalism." *Id.* at 1082. The FAA's chief counsel concurred with the Colorado Supreme Court, concluding that this provision "refers only to those activities that a state or local government could ordinarily regulate, such as license fees or taxes." *Id.* at 1083. Thus, the FAA's interpretation of its own documents should control—not Respondents' misinterpretations of them.

Furthermore, Petitioners' Certificate of Authorization expressly authorizes "aerial advertisement banner towing" in "Hawaii." App. 59a (Certificate of Authorization). Similarly, the certificate at issue in *Banner Advertising* expressly

authorized banner towing for purposes of advertising.[2] *See Banner Adver., Inc.*, 868 P.2d at 1082. In contrast, Skysign was not engaging in banner towing; its operation involved the use of a lighted sign attached to the fuselage of a helicopter. *See id.* at 1113. As a result, Skysign's certificate did not contain such a provision.

In summary, a close reading of the *Skysign* and *Banner Advertising* decisions reveals that the facts of this case are similar to those presented to the Colorado Supreme Court in *Banner Advertising* and distinguishable from those presented to the Ninth Circuit in *Skysign*. Indeed, the facts presented here, particularly in light of the recent FAA promulgations and regulations outlined more fully in the Petition, *see* Pet. at 6-10, provide a compelling case for finding that federal law preempts local ordinances that totally ban FAA approved tow-banner operations.

Finally, Respondents inaccurately claim that "Petitioners acknowledge that the FAA has taken a position opposite of the one they assert, but they nonetheless present a convoluted argument that their view of FAA documents somehow supports preemption even though the FAA itself disagrees," referring to the July 2003 letter by the FAA's Deputy Counsel. Opp. Br. at 5. Contrary to Respondents' assertion and despite the FAA's seemingly inconsistent position on banner towing,[3] the FAA is

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[2] This was an important fact in the *Skysign* decision. *See Skysign Int'l, Inc.*, 276 F.3d at 1118, n. 6 (noting that the FAA Certificate in *Banner* "explicitly permitted '[b]anner [t]owing for the purpose of advertising'").

[3] As the Ninth Circuit observed, "The FAA's position on banner towing is difficult to divine," App. 12a, n.2, noting that the July 2003 FAA letter "contains internally conflicting language," App. 12a, n.2.

consistent on this point: local regulations that have the effect of totally banning tow-banner operations that have been approved by the FAA under individual Certificates of Authorization are federally preempted. *See, e.g., Banner Adver., Inc.*, 868 P.2d at 1077. In the very letter relied upon by Respondents, the FAA counsel unequivocally stated that "State or local regulations that have the effect of totally banning or unreasonably restricting banner towing would . . . be preempted since such regulations have the practical effect of barring aircraft operations that have been authorized under Individual Certificates of Waiver or Authorization issued by the FAA." App. 79a (FAA letter) (emphasis added). Because the Honolulu Ordinance totally bans banner-towing operations, it has the effect of barring aircraft operations that have been authorized under individual certificates issued by the FAA. *See* App. 59a (Petitioners' Certificate of Authorization). Thus, according to the FAA, the Honolulu Ordinance is federally preempted.

II. The Application of First Amendment Principles to the Issues Presented by this Petition Compels a Finding that the Honolulu Ordinance Is Unconstitutional.

Whether the *navigable airspace* is a federally designated public forum for purposes of Petitioners' aerial political speech is a question of first impression for this Court. Nonetheless, it is a question that can be resolved in Petitioners' favor by the proper application of well-established First Amendment principles. As this Court explained in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985), "[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest." *Id.* "A public forum may be created by government designation of a place or *channel of communication* for use by the public at

large for assembly and speech, *for use by certain speakers*, or for the discussion of certain subjects." *Id.* at 802 (emphasis added). Applying this analysis to the navigable airspace compels the conclusion that it is a federally designated public forum for certain forms of speech, such as Petitioners' aerial political speech. At a minimum, the navigable airspace is a designated public forum because the FAA allows certain speakers to use this airspace to communicate a wide variety of messages, including Petitioners' political message. *See* App. 74a (FAA Handbook) (stating that "[t]he FAA does not regulate the content or messages displayed on banners towed by aircraft").

Thus, it is evident from the facts of this case and the history of tow-banner operations that the navigable airspace is compatible with expressive activity, and the FAA concurs because it issues permits to allow such activity. And there should be no dispute over who controls the navigable airspace: it is the exclusive province of the federal government. *See Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (noting that federal control over the navigable airspace "is intensive and exclusive"); 49 U.S.C. § 40103 (stating that the federal government has exclusive sovereignty of the airspace of the United States). Respondents have no authority to close this federal forum to Petitioners' political speech activity, which has FAA approval and authorization.

Respondents' reliance on *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), is misplaced. *See* Opp. Br. at 8-9. In *Lee*, this Court affirmed that a "designated public forum, whether of a limited or unlimited character," is property under government control that "has [been] opened for expressive activity by part or all of the public." *Id.* at 678. Moreover, a regulation of speech in such a forum is subject to the highest scrutiny. *Id.*

In *Lee*, this Court held that an airport terminal was not a public forum due, in part, to "the lateness with which the modern air terminal has made its appearance" and the fact that the government entities responsible for the control of the terminals at issue had not opened these facilities to expressive activity. *Id.* at 680. Thus, the history and practice governing airport activity demonstrated that an airport terminal was not a public forum. *Id.* at 680-81.

In contrast, in the present case the government entity responsible for the control of the navigable airspace (i.e., the federal government through the FAA) has opened this forum for expressive activity. And history demonstrates that the navigable airspace is compatible with this form of speech. In fact, Petitioners have expressed their political message via aerial tow banners in approximately nineteen other states pursuant to FAA authorization, and this number continues to grow. *See* Pet. at 3.

In summary, this Court's precedent compels a finding that the navigable airspace has been opened for expressive activity by the only government entity capable of doing so—the FAA. Consequently, the navigable airspace is a federally designated public forum, and Respondents have no authority to close it to Petitioners' political speech.

Respondents note "that the Constitution 'does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.'" Opp. Br. at 13 (quoting *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981)). As a general proposition, this is obviously true. However, the First Amendment is not simply about the right to catharsis—it is about the right to meaningfully participate in public debate on important issues, such as abortion. Respondents seek to create

an "island paradise" exempt from the proscriptions of the First Amendment by relegating Petitioners to inefficient, costly, unsafe, and most importantly, ineffective ways to express their political message. The large and graphic photographs displayed on Petitioners' aerial banners are Petitioners' message. It is a specious argument to claim that there are ample alternatives in Honolulu for these large photographs, which convey a message that is rhetorically inexpressible.[4] And the tow-banner aircraft is the only effective and available way for Petitioners to convey this political message to the large numbers of people who visit the beaches in Honolulu. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (affirming grant of injunction and noting that "alternative mode[s] of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened'" and that "an alternative is not ample if the speaker is not permitted to reach the 'intended audience'").

Moreover, this Court has voiced particular concern with laws that foreclose an entire medium of expression—and this concern is not limited to cases involving "the unique source-identifying ability of residential signs," as Respondents erroneously contend. *See* Opp. Br. at 14. While *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), does support the contention that a total ban on a particular medium of expression is

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[4] Honolulu bans the use of billboards and "any sign which advertises or publicizes an activity not conducted on the premises on which the sign is maintained," including a ban on "portable signs," which are signs that are not permanently attached to a building. A "portable sign" cannot exceed 16 square feet in sign area, which is much smaller than Petitioners' photographs. This restriction significantly reduces the impact and effectiveness of Petitioners' message. *See* Rev. Ordinance of Honolulu §§ 21-7.20 & 21-7.30.

constitutionally suspect, Petitioners' argument is not simply limited to the facts of *City of Ladue*. Indeed, this Court's concern for such broad speech restrictions is not so limited that it only applies to residential signs and their "unique source-identifying ability." *See, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (invalidating a ban on live entertainment); *Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938) (invalidating a ban on the distribution of pamphlets); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (invalidating a ban on the use of handbills on public streets); *Martin v. City of Struthers*, 319 U.S. 141, 145-149 (1943) (invalidating a ban on the door-to-door distribution of literature); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 525-27 (1981) (Brennan, J., concurring) (concluding that a city's ban on billboards was invalid because "the *practical* effect of the . . . ordinance is to eliminate the billboard as an effective medium of communication" for noncommercial speech, and that the city had failed to make the strong showing necessary to justify such a total restriction). Respondents' attempt to pigeonhole Petitioners' First Amendment claim should be rejected.

CONCLUSION

Because the Ninth Circuit has decided an important federal question in a way that directly conflicts with a decision by the Colorado Supreme Court consideration by this Court is warranted. Additionally, this case presents an important federal question of first impression that has national implications: whether the navigable airspace is a federally designated public forum for aerial political speech such that a local ordinance totally banning this form of expression violates the First Amendment.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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